U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLOS M. MACIAS and U.S. POSTAL SERVICE,
POST OFFICE, Albuquerque, NM

Docket No. 01-1589; Submitted on the Record;
Issued November 1, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issue is whether appellant sustained an emotional condition causally related to factors of his employment.

On October 15, 1996 appellant, then a 48-year-old mail distribution clerk, filed an occupational disease claim alleging that he sustained an emotional condition as a result of being unable to perform a job he bid for due to nonwork injury-related limitations[1], given letters of warning because of unscheduled absences[2], asked to work outside his medical restrictions, required to submit updated medical documentation, verbal abuse and harassment due to his disability and being physically assaulted on September 5, 1996 by his supervisor.

In a note dated July 25, 1995, Dr. Patrick Rivera, appellant's family practitioner, stated that appellant's medical problems were aggravated by work stress.

In an affidavit dated September 6, 1996, appellant alleged that on September 5, 1996 supervisor Richard Finkenburg demanded appellant's light-duty form from his physician. Appellant indicated that he was not required to submit the form until the following Friday. Mr. Finkenburg yelled and demanded the form. He grabbed appellant by the arm and told him to go home. Appellant told him that the form was at home. As he and Mr. Finkenburg were walking to the dock office, Mr. Finkenburg grabbed appellant's head.

In an affidavit dated September 9, 1996, Orlando Marquez stated that on September 5, 1996 he saw Mr. Finkenburg holding appellant's arm but it appeared to him that they were

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[1] Appellant was later given a permanent light-duty position and required to submit medical documentation every six months. His grievance was settled without a finding of fault by the employing establishment.

[2] Appellant's grievance was settled without a finding of fault by the employing establishment and his letter of warning was reduced to a discussion.

"fooling around" and he had seen them joking around in the past. A few minutes later appellant asked him to sign a statement but he refused because he did not know the whole situation.

In an affidavit dated September 10, 1996, Joseph Lucero indicated that on September 5, 1996 he saw Mr. Finkenburg pulling appellant by both hands, trying to get him into the dock office but then let him go. It appeared to Mr. Lucero that appellant and Mr. Finkenburg were joking and were not serious.

In a statement dated September 12, 1996, Mr. Finkenburg stated that on September 5, 1996 he had asked appellant for the light-duty form that he was required to submit every six months. Appellant said that he did not like Mr. Finkenburg and no one liked him. Mr. Finkenburg jokingly told appellant that he liked him and hugged him. Mr. Finkenburg denied that he grabbed appellant at any time and made no threats. He told appellant to leave work because he was not permitted to perform his light-duty job without documentation.

In an investigative report dated September 13, 1996, a employing establishment inspector noted that on September 6, 1996 appellant alleged that on September 5, 1996 Mr. Finkenburg pulled his left arm two times and grabbed him around the neck when they disagreed about appellant's light-duty form. The inspector stated that appellant told him he had no pain or injury as a result of the incident.

The record shows that appellant's grievance regarding the September 5, 1996 incident was denied because there was insufficient evidence that Mr. Finkenburg assaulted appellant.

In a report dated September 13, 1996, Robert C. Ericson, a licensed clinical psychologist, stated that appellant had been having conflicts with his supervisor concerning his light-duty job and required documentation. Dr. Ericson stated that during an altercation the supervisor put appellant in a headlock and exacerbated an existing neck injury.[3] He diagnosed an adjustment disorder with depressed mood.

In a report dated September 18, 1996, Dr. Rivera indicated that appellant's recent interaction with his supervisor caused a cervical strain and adjustment disorder.

In a statement dated October 28, 1996, an employing establishment compensation specialist, Gary Myers, stated that appellant had not been harassed or assaulted by his supervisor and was only asked to provide updated medical documentation.

In a statement dated February 21, 1997, Eugene Gabaldon, a union representative, stated that on September 4, 1996 he saw Mr. Finkenburg holding appellant in a headlock, but appellant pulled out of it quickly and he perceived the incident as horseplay. Mr. Gabaldon stated that on September 5, 1996, he observed appellant and Mr. Finkenburg arguing about medical documentation that appellant had been asked to provide. Mr. Gabaldon asked appellant to bring in the documentation the next day and Mr. Finkenburg agreed.

[3] Dr. Ericson noted that appellant had sustained a neck injury in a motor vehicle accident three and one-half years previously.

By decision dated March 26, 1997, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the evidence of record failed to establish that he sustained an emotional condition causally related to compensable factors of employment.

By letter dated March 12, 1998, appellant requested reconsideration.

By decision dated June 4, 1998, the Office denied modification of its March 26, 1997 decision.

Appellant subsequently submitted medical evidence.

By decision dated August 21, 2000, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that he sustained an emotional condition causally related to compensable factors of employment.[4]

The Board finds that appellant failed to establish that he sustained an emotional condition causally related to factors of his employment.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[5] On the other hand the disability is not covered where it results from such factors as an employee's fear of a reduction in force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[6]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.[7] This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[8]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its

[4] The record contains additional evidence that was not before the Office at the time it issued its August 21, 2000 decision. The Board has no jurisdiction to review this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

[5] 5 U.S.C. §§ 8101-8193.

[6] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[7] *See Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[8] *See Effie O. Morris*, 44 ECAB 470, 473 (1993).

adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[9] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[10]

In this case, appellant attributed his emotional condition to a number of employment incidents and conditions. The Board must, thus, initially determine whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant's allegations regarding letters of warning for unscheduled absences, being required to submit updated medical documentation and being unable to perform a job he bid on due to nonwork-related physical limitations relate to administrative or personnel matters and are unrelated to the employee's regular or specially assigned work duties. Thus, they do not fall within the coverage of the Act.[11] Although these matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[12] However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In this case, the employing establishment denied that its erred or acted abusively in its handling of administrative or personnel matters and appellant has provided insufficient evidence of error or abuse. The record shows that appellant's grievance concerning the letters of warning about his absences was settled without a finding of fault by the employing establishment and his letter of warning was reduced to a discussion. Regarding the position he could not perform due to nonwork-related medical limitations, appellant was later given a permanent light-duty position and his grievance was settled without a finding of fault by the employing establishment. The mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.[13] Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant has also alleged that harassment on the part of his supervisors contributed to his claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[14]

[9] *See Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

[10] *Id.*

[11] *See Dinna M. Ramirez*, 48 ECAB 308, 313 (1997); *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

[12] *See Anne L. Livermore*, 46 ECAB 425, 431-32 (1995); *Richard J. Dube*, 42 ECAB 916, 920 (1991).

[13] *Id.*

[14] *See David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

However, for harassment to give rise to a compensable disability under the Act, there must be evidence that the alleged harassment did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[15] In this case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors.[16] In a statement dated October 28, 1996, an employing establishment compensation specialist, Mr. Myers stated that appellant had not been harassed by his supervisor and was only asked to provide updated medical documentation. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant also alleged that Mr. Finkenburg physically assaulted him on September 5, 1996 by grabbing him by the arms and head. In an investigative report dated September 13, 1996, a employing establishment inspector stated that on September 6, 1996 appellant alleged that on September 5, 1996 Mr. Finkenburg pulled his left arm two times and grabbed him around the neck when they disagreed about appellant's light-duty form. The inspector stated that appellant told him he had no pain or injury as a result of the incident. The Board has recognized the compensability of physical threats and assaults in certain circumstances.[17]

In a statement dated September 12, 1996, Mr. Finkenburg stated that on September 5, 1996 he had asked appellant for the light-duty form that he was required to submit every six months. Appellant said that he did not like Mr. Finkenburg and no one liked him. Mr. Finkenburg jokingly told appellant that he liked him and hugged him. He denied that he grabbed appellant at any time and made no threats. He told appellant to leave work because he was not permitted to perform his light-duty job without documentation. In an affidavit dated September 9, 1996, Mr. Marquez stated that on September 5, 1996 he saw Mr. Finkenburg holding appellant's arm but it appeared to him that they were "fooling around" and he had seen them joking around in the past. In an affidavit dated September 10, 1996, Mr. Lucero indicated that on September 5, 1996 he saw Mr. Finkenburg pulling appellant by both hands, trying to get him into the dock office but then let him go. It appeared to him that appellant and Mr. Finkenburg were joking around and were not serious. In a statement dated February 21, 1997, Eugene Gabaldon, a union representative, stated that he saw Mr. Finkenburg holding appellant in a headlock but appellant pulled out of it quickly and he perceived the incident as horseplay. This statement was submitted some five months following the alleged incident and is of diminished probative value. The record shows that appellant's grievance regarding the September 5, 1996 incident was denied because there was insufficient evidence that Mr. Finkenburg physically assaulted appellant. The witness statements and other evidence of record regarding the alleged assault are insufficient to establish that Mr. Finkenburg physically

[15] *See Donna J. DiBernardo*, 47 ECAB 700, 703 (1996); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[16] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[17] Physical contact arising in the course of employment may give rise to a compensable factor of employment. *See Helen Casillas*, 46 ECAB 1044 (1995). In this case, the witness statements do not support appellant's allegation of a physical assault by Mr. Finkenburg as the contemporaneous reports indicate appellant and his supervisor were joking around.

assaulted appellant. Therefore, appellant has not established a compensable employment factor with regard to this allegation.

Appellant alleged that he was asked to work outside his medical restrictions. The Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity was substantiated by the record.[18] However, appellant has provided insufficient evidence that he was asked to perform work in violation of his restrictions and, therefore, he has not established a compensable employment factor in this regard.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition while in the performance of duty.[19]

The August 21, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 1, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

[18] *See Diane C. Bernard*, 45 ECAB 223, 227 (1993).

[19] Because appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *See Garry M. Carlo*, 47 ECAB 299, 305 (1996).